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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1593

PROVISION HOUSE WORKERS UNION LOCAL 274, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The memorandum of the court of appeals (Pet. App. 3) is not officially reported. The Board's decision and order (Pet. App. 4-35) are reported at 197 NLRB No. 150.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-2) was entered on April 9, 1974. The petition for a writ of certiorari was filed on April 24, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly deferred the exercise of its unfair labor practice jurisdiction pending an effort by the parties to resolve the dispute under the grievance and arbitration procedure of their collective bargaining agreement.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pages 3 and 22 of the petition. Also relevant are the following provisions of—

1. The National Labor Relations Act, as amended (61 Stat. 137, 29 U.S.C. 151):

> Section 1. * * * Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury * * * by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working

conditions, and by restoring equality of bargaining power between employers and employees.

* * * * *

It is hereby declared to be the poiicy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce * * * by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

2. The Labor-Management Relations Act (61 Stat. 154, 29 U.S.C. 173(d)):

Section 203(d). Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. * * *

STATEMENT

A. The Board's Decision

Urban Patman, Inc. ("the Company") is engaged in the meat processing business in Los Angeles, California (Pet. App. 10). For many years, the Company's production employees have been represented by Provision House Workers Union Local 274, AFL-CIO ("the Union") (Pet. App. 10, 11, n. 3; Tr.

140-141).[1] The Company is a member of the Associated Meat Jobbers of Southern California ("the Meat Jobbers"), a multi-employer bargaining association (Pet. App. 11; Tr. 140-141). Employees engaged in the Company's fresh meat processing operation are covered by the collective bargaining agreement between the Union and the Meat Jobbers; employees in the Company's sausage-making department are covered by the collective bargaining agreement between the Union and the Independent Sausage Kitchens, another multi-employer association (Pet. App. 11-12; Tr. 68-69, 71-74, 280-281). Although the Company does not belong to the Independent Sausage Kitchens and does not participate in the negotiation of that agreement with the Union, the Company and other members of the Meat Jobbers with sausage operations have traditionally authorized the Meat Jobbers to adopt the Independent Sausage Kitchens Agreement (hereafter "the Agreement") on their behalf (*ibid.*).

In 1968, the Company started a precooked foods department on an experimental basis with two employees and a single broiler (Pet. App. 10; Tr. 180). As that operation became more profitable, new machinery was purchased, and the work complement gradually increased to a peak of 44 employees by 1971 (Pet. 3, Pet. App. 11; Tr. 180-182).[2] The

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[1] "Tr." refers to the transcript of the unfair labor practice hearing; "G.C. Exh." refers to the General Counsel's exhibits and "R. Exh." to the respondent's exhibits in that proceeding.

[2] The record does not show how many of these 44 employees were newly hired and how many were transferees from the

Company's precooked food employees were not specifically covered by the Agreement with the Union, but their wages were fixed by the Company on the basis of comparable jobs in the Agreement (Pet. 4, Pet. App. 13; Tr. 182-183, 209-210).

Negotiations between the Union and the Meat Jobbers for a new contract took place in late summer and fall of 1970 (Pet. 4-5, Pet. App. 14; Tr. 68-71, 283). Concurrent contract negotiations were also going forward between the Union and the Independent Sausage Kitchens (Tr. 281). When the Company's bargaining agent in the Meat Jobbers negotiations proposed that a special set of rates for the precooked food employees be negotiated in the Agreement between the Union and the Independent Sausage Kitchens, the Union responded that "there were now more important items on the bargaining table, and that there could be no discussion of that item at that time" (Pet. 5, Pet. App. 14; Tr. 280-283, 285-286).

In November 1970, the Union and the Independent Sausage Kitchens agreed on a 3-year contract, retroactively effective from October 1, and the Agreement was ratified by the Union's membership, including employees of the Company (Pet. 5, Pet. App. 14-15; Tr. 50, 281; G.C. Exh. 2). No special provisions were included in the Agreement for employees in precooked food (Pet. App. 12; G.C. Exh. 2; Tr. 219-220). On learning of the Agreement's ratification in December 1970, the Company retroactively granted

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Company's sausage-making operation, which was decreasing during this period (Pet. 3, Pet. App. 13; Tr. 182).

the new contract benefits to employees in both its sausage and precooked foods departments, although the Meat Jobbers had not yet signed the Agreement on the Company's behalf [3] (Pet. 5, Pet. App. 15; Tr. 133-134, 138-139, 231).

About this time, the Company began losing bids and suffering operating losses in the precooked foods department (Pet. App. 16; Tr. 227-228, 236, 191; R. Exh. 5). The Company learned that many of its competitors in the precooked foods business were paying much lower wages than it did, and that several of these competitors had contracts with the Union's parent labor organization (Pet. App. 16-17; Tr. 191-192, 226-227, 231-236). President Patman warned the Union in March 1971 that, unless he could get wage rates equal to those of his competitors, he would have to close the precooked foods department (Pet. App. 17; Tr. 233-234).

The Company and the Union then entered into negotiations on wages and fringe benefits for the precooked food employees; however, they had not reached agreement by the time of the Company's annual layoff of its employees for the month of June (Pet. App. 18-20; Tr. 14-15, 235-236, 248, 289-297). After the layoff began, the Union, on June 2, agreed to present the Company's final offer on wages and fringe benefits to the precooked food employees for ratification (Pet. App. 20-21; Tr. 297, 301-302, 355-356). Some 20 laid-off employees met with Union officials that night

[3] The Company did not authorize the signing of the Agreement until June 17, 1971 (*infra*, pp. 7-8).

and voted to reject the Company's proposal (Pet. App. 21; Tr. 38).[4]

In the following weeks, attorneys for the Company and the Union discussed ways to resolve the labor costs problem so that the Company could reopen the precooked foods department after the June layoff (Pet. App. 21-22; Tr. 303-306, 378-382). Company Attorney Simon took the position that there was no contract on the wages and fringe benefits of the precooked food employees (Pet. App. 22; Tr. 334-338). Union Attorney Richman responded that, if Simon thought he could sustain that theory, the Union would file a charge with the Board alleging that the Company had violated Section 8(a)(5) of the Act by repudiating the collective bargaining agreement. If the Regional Director ruled for the Company on the contract issue and dismissed the charge, Richman said he would accept the decision without appeal and would advise the Union that there was no contract (Pet. App. 22; Tr. 383).

The parties also discussed the possibility of submitting their dispute to arbitration as provided for in the Agreement, but this solution was ultimately rejected by the Union's attorney (Pet. App. 22; Tr. 311, 380-381). At some point in the negotiations, Company Attorney Simon authorized the Meat Jobbers to sign the Agreement on behalf of the Company,

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[4] An economic layoff earlier in the spring had reduced the work complement in the precooked foods department from about 44 to 25 employees (Pet. App. 20; Tr. 14, 248).

and the Agreement was signed on June 17, 1971 (Pet. App. 22, n. 8; Tr. 308-309; G.C. Exh. 2).[5]

By letters dated June 22, 1971, the Company advised the precooked food employees that the annual layoff would end on June 25, but that the Company could afford to reopen only with wages and fringe benefits which did not cost more than its competitors were paying. The letters then set out the wages and fringe benefits that precooked food employees would receive after June 28, which were said to equal the best terms provided by any competitor. These were the same terms that the Company had presented to the Union on June 2 and that the employees had rejected that night (Pet. 8, Pet. App. 23; Tr. 8; G.C. Exh. 3). On June 28, approximately 17 of the 19 recalled employees returned to work and received the new wages and fringe benefits provided for in the Company's letter of June 22 (Pet. App. 24; Tr. 14-15, 193).

The Union filed an unfair labor practice charge with the Board on June 28, and a complaint issued on August 31 (G.C. Exhs. 1(a) and 1(c)). The complaint was predicated on the theory that the current Agreement established the terms and conditions of employment for the Company's precooked food employees, as well as for employees in the sausage department; therefore the Company's institution of

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[5] Simon testified that he authorized execution of the Agreement on the understanding that Union Attorney Richman would recommend arbitration of the dispute over the precooked food employees (Pet. App. 22, n. 8; Tr. 308-309).

lower wages and fringes in the precooked foods department constituted a mid-term modification of the contract in violation of Section 8(a)(5) and (1) of the Act (Pet. App. 4-5, 33-34).

The Company maintained, on the other hand, that the wages and fringe benefits of employees in precooked foods were not covered by the Agreement, and that, after bargaining with the Union unsuccessfully, it was free to institute the terms previously offered to the Union (Pet. App. 5; Tr. 334-335, 312-313). In support of its argument, the Company relied on Article IV, Section 12 of the Agreement, which provided (Pet. App. 28; G.C. Exh. 2; Tr. 312-313, 334):

> 12. In the event there are new jobs or classifications or new machines they shall be subject to immediate negotiations. * * *

The Company also urged that the Board should defer its decision until an attempt was made to resolve the dispute through arbitration under the contract grievance procedure. The grievance and arbitration provisions of the Agreement read in pertinent part (Pet. App. 5-6; G.C. Exh. 2):

> Article VI
>
> * * * * *
>
> 2. No employee covered by this Agreement shall be demoted, suspended, dismissed or otherwise disciplined without just and sufficient cause. Should any action by an Employer cause an employee covered by this Agreement to become

aggrieved, such employee shall orally or in writing make his complaint to the Union * * *.

* * * * *

4. In the event the parties are unable to resolve any dispute through the grievance procedure set forth in Section 2 hereof, either party may demand that the dispute proceed to abritration * * *.

5. The findings of the arbitrator shall be binding upon both the Union and the Employer providing, however, that the arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement.

No controversy regarding hours or wages shall be subject to arbitration hereunder and the provisions of this Article shall not in any way interfere with the right of any party to seek relief at law, in equity, or before any administrative tribunal where a controversy regarding hours or wages exists.

The Board ruled that the "essence of the dispute * * * is whether the present contract covers the precooked foods department employees," and that this issue "can best be resolved by arbitration" (Pet. App. 5). Accordingly, the Board (with one Member dissenting), following its decision in *Collyer Insulated Wire*, 192 NLRB 837, concluded that it would be appropriate to withhold its processes pending an effort by the parties to resolve the dispute under the contractual grievance and arbitration procedure (Pet. App. 7). The Board thus dismissed the complaint but retained jurisdiction "to entertain an appropriate

and timely motion for further consideration upon a proper showing that * * * (a) the dispute has not, [with] * * * reasonable promptness after the issuance of this Decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the dispute has been duly found by the arbitrator not to be arbitrable, or (c) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act" (*ibid.*).

B. The Decision of the Court of Appeals

The court of appeals held that "[t]he Board did not exceed its jurisdiction, nor did it abuse its discretion, in deferring exercise of that jurisdiction pending arbitration" (Pet. App. 3). The court added that, "[o]f course, the Board cannot abdicate its statutory responsibilities by inappropriate deferrals to arbitration," but concluded that "[t]he record before us raises no inference that the Board failed to perform its duties" (*ibid.*).

ARGUMENT

The decision of the court of appeals sustaining the Board's deferral to the contractual grievance and arbitration procedure is correct and not in conflict with other decisions. No issue warranting review by this Court is presented.

1. In *Collyer Insulated Wire*, 192 NLRB 837, the Board announced that, where the question whether there has been a refusal to bargain turns upon an

interpretation of the collective bargaining agreement and the agreement contains a grievance and arbitration procedure which is likely to result in a prompt and fair resolution of the dispute, it would withhold its processes pending resort by the parties to the contract procedure. However, the Board added that it would entertain a motion for further consideration on a proper showing that the dispute had not been properly settled or submitted to arbitration, or that the grievance and arbitration procedure had not been fair and regular or had reached a result that was repugnant to the Act.

Every court of appeals that has passed on the Board's policy of deferral in these circumstances[6] has approved it. See *Associated Press* v. *National Labor Relations Board*, 85 LRRM 2440, 2444, February 20, 1974 (C.A.D.C.); *I.B.E.W., Local 2188* v. *National Labor Relations Board* (*Western Electric Co.*), 85 LRRM 2576, 2578, February 28, 1974 (C.A.D.C.), petition for certiorari filed, No. 73-1788; *Enterprise Publishing Co.* v. *National Labor Relations Board*, 85 LRRM 2746, March 18, 1974 (C.A. 1); *Nabisco, Inc.* v. *National Labor Relations Board*, 479 F. 2d 770 (C.A. 2); and the Ninth Circuit's decision in this case. See also *Local*

[6] In *National Radio Co.*, 198 NLRB No. 1, 80 LRRM 1718, the Board concluded that it would effectuate the policies of the Act to defer action on an alleged violation of Section 8(a)(3) and (1) the Act pending the completion of efforts under the contract grievance and arbitration procedure to resolve the question whether the alleged discriminatee had been disciplined for "just cause." The propriety of this application of the *Collyer* policy is not presented here.

715 v. *National Labor Relations Board* (*Malrite of Wisconsin, Inc.*), 85 LRRM 2823, March 29, 1974 (C.A.D.C.). And see *William E. Arnold Co.* v. *Carpenters District Council*, No. 73-466, decided May 20, 1974, slip op., pp. 4-5.

2. The Board's decision to defer the exercise of its jurisdiction where the unfair labor practice issue turns on a contract interpretation question and the arbitral process is available and capable of resolving the dispute furthers the Act's policy of encouraging "practices fundamental to the friendly adjustment of industrial disputes" and "the practice and procedure of collective bargaining" (Section 1, *supra*, pp. 2-3). See also Section 203(d) of the Labor-Management Relations Act, *supra*, p. 3. Moreover, such a deferral policy is supported by the legislative history of the 1947 amendments to the Act.

Congress deleted from those amendments provisions which would have made it an unfair labor practice to violate the terms of a collective bargaining agreement with the explanation that, "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42, I Leg. Hist. of the Labor-Management Relations Act 546 (GPO, 1948).[7] At the same

[7] Even the proponents of this provision commented (S. Rep. No. 105, 80th Cong., 1st Sess. 23, I Leg. Hist. of the Labor-Management Relations Act, *supra*, 429):

> It is the purpose of this bill to encourage free collective bargaining; it would not be conducive to that objective

time, Congress enacted Section 301(a) of the Labor-Management Relations Act (29 U.S.C. 185(a)), giving the district courts jurisdiction of suits for violation of contracts between an employer and a labor organization. Congress thus not only denied the Board "plenary authority to administer and enforce collective bargaining contracts," but it also established arbitrators and the courts as "the principal sources of contract interpretation." *National Labor Relations Board* v. *Strong*, 393 U.S. 357, 360-361.

Finally, the Board's *Collyer* deferral policy is a logical corollary of its long-standing policy of deferring to an outstanding arbitral award where it has resolved the pending unfair labor practice issues in a manner not repugnant to the Act, the procedure followed was fair and regular, and all parties agreed to be bound by the award. See *Spielberg Mfg. Co.*, 112 NLRB 1080. The Board's post-award deferral policy has been noted with approval by this Court. See *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 271; *Smith* v. *Evening News Assn*, 371 U.S. 195, 198, n. 6; *National Labor Relations Board* v. *Plasterers' Union*,

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if the Board became the forum for trying day-to-day grievances or if in the guise of unfair labor practice cases it entertained damage actions arising out of breach of contract. Hence the committee anticipates that the Board will develop by rules and regulations a policy of entertaining under these provisions only such cases alleging violation of contract as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration, or if necessary by litigation in court. Any other course would engulf the Board with a vast number of petty cases that could best be settled by other means * * *.

Local 79, 404 U.S. 116, 136-137. See also *National Labor Relations Board* v. *Auburn Rubber Co.*, 384 F. 2d 1 (C.A. 10); *John Klann Moving Co.* v. *National Labor Relations Board*, 411 F. 2d 261, 263 (C.A. 6), certiorari denied, 396 U.S. 833.

3. The court of appeals properly held (Pet. App. 3) that the Board was reasonable in applying its *Collyer* deferral policy here. The dispute in the present case turns on whether the Company was contractually liable to pay the precooked foods employees the wages and fringe benefits provided in the Agreement. The Agreement provides for binding arbitration. The long history of collective bargaining, the absence of anti-union animus, and the fact that the Company itself sought arbitration of the dispute support the likelihood that the contractual procedure will result in an amicable adjustment.[8]

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[8] Contrary to petitioner's contention (Pet. 39-40), the Board properly determined that the dispute here is subject to arbitration under the contract. Thus, there is no question that the Company is bound by the Agreement. Moreover, while the arbitration clause excludes a "controversy regarding hours or wages," it is at least arguable that such exclusion was not intended to encompass the "coverage" question of whether the employees in the precooked foods department fit into the job classifications set forth in the contract and are thus entitled to the wages and other benefits prescribed for those classifications, or whether their terms must be negotiated pursuant to Article IV, Section 12 of the Agreement (*supra*, p. 9). In these circumstances, there is a sufficient basis for submitting the issue to arbitration. See *United Steelworkers* v. *Warrior and Gulf Navigation Co.*, 363

4. Petitioner's other contentions are also without merit.

a. Petitioner attacks the policy enunciated in *Collyer* on the ground that the Board there engaged in rulemaking without following the rulemaking procedures of the Administrative Procedure Act (Pet. 13). But this Court has recently reaffirmed that "the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *National Labor Relations Board* v. *Bell Aerospace Co., Division of Textron, Inc.*, No. 72-1598, decided April 23, 1974, slip op., p. 27. Petitioner points to no prejudice it suffered from reliance on pre-*Collyer* precedent and the present case falls squarely within the rationale of *Collyer*. Petitioner's expressed concern that other litigants will be misled to their detriment or that *Collyer* will be misapplied in other contexts is appropriately left for cases that present those issues.[9]

U.S. 574, 582-583; *Gateway Coal Co.* v. *United Mine Workers*, No. 72-782, decided January 8, 1974, slip op., p. 11, n. 10. Similarly, since there is no question that the precooked food employees were part of the production unit represented by the Union, there is no substance to petitioner's further contention (Pet. 25) that the Board deferred to arbitration the determination of an appropriate unit or a statutory bargaining representative.

[9] *National Labor Relations Board* v. *Chase Mfg. Co.*, 85 LRRM 2602, February 5, 1974 (C.A. 7), cited by petitioner (Pet. 14), is distinguishable on the face of the quotation printed in the petition. The Board failed to defer in that case because there was "no claim that the company believed it had

b. Petitioner asserts that the Board's *Collyer* deferral policy constitutes an improper cession of its unfair labor practice jurisdiction (Pet. 22-28), and unduly subordinates the public's interest in enforcement of the Act to private remedies (Pet. 28-37). However, Section 10(a) of the Act empowers, but does not require, the Board to exercise its unfair labor practice jurisdiction. Accordingly, the Board has "considerable discretion to * * * decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act." *International Harvester Co.*, 138 NLRB 923, 925-926, quoted with approval in *Carey* v. *Westinghouse Co.*, *supra*, 375 U.S. at 271. See also *National Labor Relations Board* v. *Indiana and Michigan Electric Co.*, 318 U.S. 9, 18. For the reasons given (*supra*, pp. 13-14), the Board's decision to withhold its processes pending an effort by the parties to resolve their hybrid contract-unfair labor practice question under the contract procedure which they have agreed to serves "the fundamental aims of the Act." Moreover, the Board has expressly retained jurisdiction to guard against possible unfairness of the arbitration procedure or a result that is repugnant to the Act (*supra*, p. 11).

Alexander v. *Gardner-Denver Co.*, No. 72-5847, decided February 19, 1974, is not to the contrary. In

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a right under the agreement to unilaterally reduce wages"; rather, that case involved " 'Respondent's complete rejection of the principles of collective bargaining' " (85 LRRM at 2603).

Title VII of the Civil Rights Act of 1964 (78 Stat. 253), Congress chose to rely on private suits as the primary means of vindicating the rights conferred, and it indicated that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. By contrast, in the National Labor Relations Act, Congress adopted a procedure to accommodate the national policy of "encouraging the practice and procedure of collective bargaining," which empowers, but does not require, the Board to exercise its unfair labor practice jurisdiction. Congress specifically indicated a preference for arbitration as a means of resolving industrial disputes. See Section 203(d) of the Labor-Management Relations Act (*supra*, p. 3). Thus, Board deferral here is consistent with the policies of the Act and is to be distinguished from court deferral under Title VII, which this Court found to be counter to that statute's policy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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